IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 384 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

GULABBHAI JORJIBHAI BHAMAT & ANOTHER – Respondents

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Appearance :
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR, for the Appellant.
MR HEMANT MAKWANA, for the Respondents.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 24/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 378 of the Code of Criminal Procedure, 1973, questions legality of judgment dated February 28, 2001, rendered in Sessions Case No. 5 of 1997, by which the learned Special Judge,

Panchmahals at Godhra, has acquitted the two respondents of offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*"the Act"*, for short).

2. The facts emerging from the record of the prosecution case are as under:

Mr. D. L. Handa, who was then discharging duties as Police Sub-Inspector, Morva Police Station, was on patrolling duty on January 26, 1997 with other police personnel. When he was patrolling on Santrampur Road, he noticed two persons passing on road in suspicious circumstances at about 00-30 Hours. He, therefore, intercepted them. On interrogation, one of the persons disclosed his name to be Gulabbhai Jorjibhai Bhamat of Village: Deloch i.e. respondent No. 1 whereas another disclosed his name to be Bapubhai Dhulabhai Katara i.e. respondent No. 2 herein. PSI Mr. Handa found that both the respondents were carrying a plastic-bag. Suspecting that each of the respondents was carrying narcotic drug in the plastic-bag, he decided to search the plastic-bag. Before effecting search, PSI Mr. Handa offered the respondents to be searched in presence of a Gazetted

Officer, but the said offer was declined by the respondents. Thereupon, the plastic-bag carried by each respondent was search, which resulted into find of 3 Kgs. Of *poppy-straw* from each bag. PSI Mr. Handa demanded pass or permit from the respondents authorising them to possess *poppy-straw* but none could be produced. From each bag, sample of 100 Grams was drawn and sealed. The plastic-bags containing rest of the quantities were also sealed. The *panchnama* indicating search and seizure was drawn on the spot and the respondents were arrested. With regard to the incident in question, PSI Mr. Handa lodged complaint with Morva Police Station on the basis of which, offence punishable under Section 15 of the Act was registered against the respondents. PSI Mr. Handa investigated his complaint and recorded statements of those persons who were found to be conversant with the facts of the case. The two samples drawn were sent to Forensic Science Laboratory (FSL) for analysis. The report of analysis indicted that the substance analysed was *poppy-straw* within the meaning of the Act. On conclusion of investigation, the two respondents were chargesheeted in the Court of learned Judicial Magistrate (First Class), Santrampur, for commission of offence punishable under Section 15 of the Act. As offence

punishable under Section 15 of the Act is exclusively triable by a Special Judge, the case was committed to the Court of learned Special Judge, Panchmahals at Godhra for trial, where it was numbered as Sessions Case No. 5 of 1997.

3. The learned Special Judge, Panchmahals at Godhra, framed necessary charge against the respondents at Exh. 3. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) Police Jamadar Ladubhai Jivabhai as PW 1, at Exh. 11; (ii) Police Head-Constable Tersinh Lalabhai as PW 2, at Exh. 13; (iii) *panch* Akhambhai Malabhai as PW 3, at Exh. 14; (iv) *panch* Chandubhai Nanabhai as PW 4, at Exh. 17; (v) Businessman Chhaganbhai Ramsinh Katara as PW 5, at Exh. 19; and (vi) Investigating Officer i.e. PSI Mr. Deepsinh Lachhasinh Handa as PW 6, at Exh. 26, to prove its case against the respondents. The prosecution, also, produced documentary evidence, such as: (i) *panchnama* of search of bags carried by the two respondents and find of *poppy-straw* therefrom roughly weighing totally about 6 Kgs., at Exh. 18; (ii) complaint lodged by PSI Mr. Handa, at Exh. 27; (iii) report of analysis, at Exh. 33, etc. in support of

its case against the respondents.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, each respondent claimed that a false case was foisted upon him. However, none of the respondents led any defence evidence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was not proved by the prosecution beyond reasonable doubt that each appellant was found in possession of *poppy-straw* weighing 3 Kgs. on January 26, 1997. In view of this conclusion, the learned Judge has acquitted the two respondents by judgment dated February 28, 2001, giving rise to instant appeal.

6. The record shows that instant appeal was placed for admission hearing before the Division Bench, comprising N. G. Nandi and Ravi R. Tripathi, JJ. on July

21, 2003 and after hearing the learned Additional Public Prosecutor for the State, leave was granted and appeal was admitted. The record further shows that bailable warrant in the sum of Rs. 5,000/- (Rupees Five Thousand Only) was also ordered to be issued against each of the respondents. Though the respondents are duly served, they have neither appeared in person nor through their lawyer. The Court felt that it was necessary to appoint an Advocate to assist the respondents and accordingly, Mr. Hemant Makwana, learned Advocate, is appointed to assist the respondents.

7. This Court has heard Mr. K. T. Dave, learned Additional Public Prosecutor for the State, and Mr. Hemant Makwana, learned Advocate, who has assisted the respondents ably, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. As noticed earlier, in short, the prosecution case is that on January 26, 1997, each of the respondents was found in possession of 3 Kgs. of *poppy-straw* without

pass or permit and was, therefore, liable to be convicted for commission of offence punishable under Section 15 of the Act. However, on re-appreciation of evidence adduced by the prosecution, this Court finds that it is not satisfactorily proved by the prosecution that each of respondents was in possession of *poppy-straw* weighing 3 Kgs. Except the evidence of Police Officers and statements made in complaint as well as *panchnama*, nothing could be produced by the prosecution on record to establish that the substance found from possession of each respondent was weighed and its weight was found to be 3 Kgs. It is relevant to notice that Jamadar Ladubhai Jivabhai, examined at Exh. 11, has stated that the substance was not weighed at the spot at all. So also, Head Constable Tersinh has stated in his testimony that the substance found from possession of the respondents was not weighed at the spot. Under the circumstances, this Court fails to understand as to how it was stated in the *panchnama,* drawn at the spot, that substance found in possession of each of the respondents was weighed at the spot and weight of the same was found to be 3 Kgs. It is not the case of the prosecution that *poppy-straw* found from possession of each of the respondents was weighed by one of the Police Officers nor the prosecution has examined anyone, who might have weighed *poppy-straw* found

from possession of each of the respondents. Thus, this Court is of the opinion that it is not satisfactorily established that the weight of *poppy-straw* found from possession of each of the respondents was 3 Kgs. Further, according to the prosecution, the appellants were found in possession of *poppy-straw* in large quantity without pass or permit on January 26, 1997, but the report of the analysis would indicate that the samples drawn were sent to FSL for analysis on February 1, 1997 i.e. after delay of six days. The prosecution has not examined anyone to prove that *muddamal* seized was handed-over to him for safe custody and that he had, in fact, kept the *muddamal* in safe custody nor the prosecution has examined the Police Officer who delivered the samples to FSL for analysis. Thus, it is not satisfactorily proved by the prosecution that samples drawn were kept in safe custody so as to rule out possibility of tampering with the same. Moreover, the procedure of sealing the samples drawn cannot be termed as foolproof. The contents of report of analysis forwarded by FSL would indicate that after removing the seal, the samples were found and slips bearing signatures of *panch-witnesses* were found intact and in loose condition. Meaning thereby, the slips bearing signatures of *panch-witnesses* were not affixed on samples nor the samples were sealed thereafter and it was

possible for anyone to substitute *muddamal* and thereafter, place the slips which were never affixed on samples. Thus, the faulty way of sealing samples would indicate that no steps were taken by PSI Mr. Handa to rule out tampering with the samples. This is to be viewed in the light of another deficiency in the prosecution case, namely, that no report was forwarded by PSI Mr. Handa to his immediate official superior, as required by Section 57 of the Act. This Court is aware of the principle laid down by the Supreme Court that in case of non-compliance of provisions of Section 57 of the Act, the accused must establish prejudice. However, in view of deficiencies pointed above, the prejudice, resulting from non-compliance of provisions of Section 57 of the Act, is writ large. On re-appreciation of evidence led by the prosecution, it is difficult for this Court to conclude that commission of offence, by the respondents or any one of them, under Section 15 of the Act, is established.

9. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the

order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so in view of the decisions rendered by the Supreme Court in the cases of (1) **Girija Nandini Devi & Others Vs. Bijendra Narain Chaudhari, AIR 1967 SC 1124**, and (2) **State of Karnataka Vs. Hema Reddy and Another, AIR 1981 SC 1417**.

10. For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.][H. B. ANTANI, J.]

/shamnath